the Regulations for the purpose of requisitioning the whole premises. There was no evidence that the Minister had personally instructed G to act on a matter of this kind. By virtue of section 7 of the Emergency Powers (Defence) Act 1939 a document must be deemed to have been made or issued by the Minister of Health until the contrary was proved. It was held that since the contrary was not proved and *since the Minister was entitled to act by an authorised official of his department* and there was no necessity that it should be shown that the Minister had given his mind to the matter personally, *no question of delegation arose* as between the Minister and G so that the maxim, *delegatus non potest delegare*, did not arise. (Emphasis provided).

By virtue of Article 132(2) of the Federal Constitution the conditions of service of persons in the federal public services may be regulated by federal law and subject to the provisions of any such law by the Yang di-Pertuan Agong. In this regard we are in the same situation as described by Denning L.J. (as he then was) in *Lewisham Borough* v. *Roberts* where he said in regard to the power of requisition

"It is a power which Parliament has conferred on the Crown, that is to say, on the Executive acting by the government departments."

We accordingly dismiss the appeal for reasons quite different from that of the learned judge. Costs to respondents. Deposit to respondents towards payment of costs.

Appeal dismissed.

Solicitors: *Wong-Chooi & Mohd. Nor.*

MALAYAN INSURANCE (M) SDN. BHD. v. ASIA HOTEL SDN. BHD.

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) October 28, 29 & December 18, 1986]

[Johor Bahru – Supreme Court Civil Appeal No. 221 of 1986]

Practice and Procedure – Claim on insurance policy – Defence of misrepresentation or non-disclosure of material facts in proposal for insurance – Application for summary judgment – Trial judge finding no merit on triable issues in the defence – Judge deciding on sole question of law – Whether relevant facts agreed on – Interlocutory judgment granted – Appeal allowed – R.H.C. 1980, O.14 & O.33 r.2.

In this case the respondents had taken out fire insurance policies and claimed for the loss resulting from a fire which severely damaged their premises. The defence denied liability and put in issue the terms and conditions contained in the policies. They also raised the issue of misrepresentation and non-disclosure or concealment of material facts. The learned judge held that the only dispute in this case was non-disclosure of material facts by the respondent on the proposal for insurance, and he determined what he thought was the sole question of law before granting summary judgment. He concluded that there was no merit or triable issue in the defence and granted interlocutory judgment. There was nothing in the record to show whether the parties in this case had agreed on all the relevant facts.

Held: (1) the Courts hearing an Order 14 application should work within the framework of Order 14 and not embark on an exercise under Order 33 rule 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the cause or matter;

(2) where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under Order 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment;

(3) in this case the issues raised in the statement of defence are factors making the case not an appropriate one for summary judgment;

(4) the underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Cases referred to:

(1) *National Company for Foreign Trade* v. *Kayu Raya Sdn. Bhd.* [1984] 2 M.L.J. 300.

(2) *European Asian Bank* v. *Punjab and Sind Bank* [1983] 2 All E.R. 508, 516.

(3) *Cow* v. *Casey* [1949] 1 All E.R. 197.

SUPREME COURT.

Khoo Eng Chin for the appellants.
Zainal Azim for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): This is an appeal against the order of the judge under Order 14 of the Rules of the High Court. The judge in his grounds of judgment determined what he thought was the sole question of law before granting summary judgment. He said (at page 11) that the only dispute was non-disclosure of material facts by the plain-

tiffs on the proposal for insurance. He concluded that there was no merit or triable issue in the defence and granted interlocutory judgment with damages to be assessed at a later date.

To appreciate fully the situation involved it is desirable to go into the background facts in some detail. The writ was taken out on January 19, 1986, and the claims were under a policy of insurance vide Fire Insurance Policy No. 6/01/0086/0183 dated January 25, 1985, for the sum of $328,000/- and a consequential Loss Policy No. 6/02/002/02/83 dated also January 25, 1985, for the sum of $329,000/- in respect of rentals, profits and salaries. It would appear that on May 11, 1985, during the currency of both policies, the premises insured were severely damaged by fire.

The statement of defence was filed on March 10, 1986, which denied liability. In paragraph 4 of the statement of defence the terms and conditions contained in both the policies were put in issue. The paragraph reads as follows:

"4. With regard to Paragraph 3 of the Statement of Claim, the Defendants contend and will contend that their liability to make any payment to the Plaintiffs under the said fire and consequential loss policies is subject to the terms and conditions contained therein or endorsed or otherwise expressed thereon."

Paragraph 12 of the statement of defence also raised the issue of misrepresentation and/or non-disclosure or concealment of a material fact.

The counsel who appeared before us for the respondent/plaintiff at the hearing of this appeal was not the same counsel who represented the plaintiff at the hearing in the High Court. He submitted to us that the facts of the case were not disputed and that the High Court judge decided on the question of law on the basis of the undisputed facts. In his grounds of decision the judge stated that the parties did not dispute the facts. But he did not set out clearly the relevant facts which the parties had agreed to and on the basis of which he was asked to decide on the question of law. Besides, the judge went on to state: "The only dispute by the defendant is non-disclosure of material facts by the plaintiff in the proposal for insurance form Exhibit CLS 1." He did not state whether he was asked by the parties to determine any question of fact from the affidavits without hearing further evidence. The record does not show whether counsel for the defendant confirmed or denied that facts were undisputed. Under the circumstances no one can really say whether the parties had agreed on all the relevant facts.

The approach to be taken by an appellate court in an Order 14 appeal has been settled. The first principle is that the appeal court should not regard the appeal as a reviewing of the exercise of the judge's discretion but should in practice approach the appeal as a rehearing. This principle is already accepted by this court in *National Company for Foreign Trade* v. *Kayu Raya Sdn. Bhd.*[1] which was also an Order 14 appeal where this court considered and followed *European Asian Bank* v. *Punjab and Sind Bank.*[2]

What is involved in the present appeal is the other principle considered in *European Asian Bank* by Goff L.J. (as he then was) that is, what happens when a legal issue is raised by the defence in an Order 14 application. In this regard several principles are involved. First, the court hearing an Order 14 application should work within the framework of Order 14 and not embark on an exercise under Order 33 rule 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the cause or matter. Order 33 rule 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under Order 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

In *Cow* v. *Casey*[3] the legal question contended by the defence to be reasonably arguable was the point of law on sub-tenancy and the protection of the Rent Restriction Acts. Lord Greene M.R. said at page 481:

"If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under Or. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the master was perfectly right, the judge was perfectly right, and the appeal should be dismissed."

Referring to *Cow* v. *Casey* Goff L.J. in *European*

Asian Bank said at page 516 on the functions of the appellate court:

"But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow* v. *Casey* [1949] 1 All E.R. 197, [1949] 1 K.B. 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Ord. 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand.' It may offend against the whole purpose of Ord. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal."

It should be noted however that Goff L.J. was cautious in his language when he said where *"a clear-cut issue"* is raised and *"when full argument has been addressed to the court."* For it may offend the purpose of Order 14 for the court not to decide a case which raises a clear-cut issue of law and when the court has the benefit of full argument. We alluded earlier to the issues raised in paragraphs 4 and 12 of the statement of defence which in our view are factors making this case not an appropriate one for summary judgment.

The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

We accordingly allowed the appeal and also directed the trial to be before another judge.

Costs to the appellants here and below. Deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Khoo & Sidhu; Azim, Ong & Krishnan.*

GOVERNMENT OF MALAYSIA & ANOR. v. JAGDIS SINGH

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) September 24 & December 19, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 138 of 1986]

Revenue Law – Income Tax – Notices of additional assessment of income tax – Application for order of certiorari to quash the said notices of additional assessment – Whether certiorari would issue where there is alternative remedy of appeal open – Best judgment assessment made by the Director General of Inland Revenue – Onus to prove that additional assessments are excessive or erroneous is on taxpayer – Allegation of malicious and vindictive acts not proved – Income Tax Act, 1967, ss. 81, 91(1), 103(3) & 120.

Administrative Law – Additional assessments of income tax – Notices – Application for order of certiorari to quash notices – Whether certiorari would issue where there is alternative remedy of appeal open – R.H.C. 1980, O.53 r.1(2).

In this case the respondent had received notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The respondent's accountant wrote to the Department of Inland Revenue, Ipoh, informing them of the respondent's desire to appeal against the additional assessments. However the respondent filed a notice of motion for an order of certiorari to quash the said notices of additional assessment. The grounds relied on by the respondent were "that the notices of assessment are based on conjecture and have been issued maliciously and as a vindictive act." The learned Judge of the High Court granted the respondent's application. The appellants appealed.

Held, allowing the appeal: (1) the discretion is still with the courts to act by way of judicial review but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice;

(2) in this case as the Inland Revenue Department was unable to make a proper assessment of the respondent's tax because of the failure of the respondent to comply with the various notices issued to him, the Department was entitled to compute the tax under section 91(1) of the Income Tax Act, according to the best of the Director-General's judgment;

(3) the onus of proving to the Special Commissioners on appeal that the additional assessments are excessive or erroneous lies on the respondent;

(4) there was no evidence to support the allegations of malice and vindictiveness. The onus is on the respondent to prove the allegations he made in his statement in support of the notice of motion and in this case the respondent had not discharged the burden.

Cases referred to:

(1) *Melayu Raya Press Ltd.* v. *W.L. Blythe, the Colonial Secretary* [1951] M.L.J. 89.